A

Re Teoh Beng Hock

HIGH COURT (SHAH ALAM) — CRIMINAL REVISION NO 43–41 OF 2009

B YEOH WEE SIAM JC

15 SEPTEMBER 2009

C *Criminal Procedure — Revision — Coroner's inquiry — Application to revise magistrate's ruling made at coroner's inquest — Magistrate made ruling to allow suspect who was investigated by the Malaysian Anti-Corruption Commission to be called as witness to tender his police report — Whether magistrate had erred in making ruling — Criminal Procedure Code s 328*

D

Evidence — Similar facts — When admissible — Whether magistrate had erred in allowing similar fact evidence to be considered — Whether similar fact evidence had material bearing on matters to be decided by magistrate at inquest E *— Evidence Act 1950 ss 11(b) & 15*

At the coroner's inquest into the cause of death of Teoh Beng Hock ('the deceased'), counsel for the family of the deceased attempted to introduce a F police report ('the police report') made by one Sivanesan ('the complainant'), a suspect who was investigated by the Malaysian Anti-Corruption Commission ('the MACC'). In the police report the complainant had complained of alleged intimidation, torture, violence and abuse perpetrated against him by the MACC officers in the course of their investigations. G Counsel for the deceased's family had sought to introduce the police report during the cross-examination of an officer from the MACC but the Director of Legal Matters and Prosecution ('the director') of the MACC objected to the introduction of the police report during the cross-examination of the MACC officer on the grounds that such police report could only be tendered H if the complainant, ie the maker of the police report, was called as a witness. Further the MACC contended that they had not been served with a copy of the police report. Upon this application by the director of the MACC, the magistrate hearing the inquest directed that a copy of the police report be served on the MACC. When the magistrate resumed hearing, the director I informed the court that the police report was not relevant because there was no nexus between the complainant's police report and the death of the deceased in this case. The director pointed out that the complainant had been interrogated as a suspect in his case whereas the deceased was interrogated as a witness in this case. The director therefore contended that the prejudicial

effect of allowing the evidence of the complainant to be admitted far outweighed the probative value of such evidence and urged the magistrate to change his ruling. Counsel for the deceased's family went on the basis that there was similar fact evidence in that the contents of the police report related to the same place and the same witness. He submitted that since the main purpose of the inquest was to discover the cause of death of the deceased under s 328 of the Criminal Procedure Code ('CPC') the admission of the complainant's evidence and the police report would aid this purpose. Counsel for the Selangor State Government submitted that there was no prejudice caused to the MACC by the magistrate's ruling in allowing the complainant to testify and allowing the police report. He also brought to the magistrate's attention the fact that there was already evidence adduced of pre-fall injuries on the deceased, as stated by the pathologist, which were consistent with the conclusion that there was an assault on the deceased. The magistrate after hearing the parties did not change his ruling as to the admissibility of the police report and the calling of the complainant as a witness. Based on the magistrate's ruling the complainant took his stand as a witness and gave his evidence at the inquest. The director of the MACC then filed the present application for a revision of the magistrate's ruling and also applied for the complainant's evidence to be expunged from the court. The sole issue for determination in this application for revision made pursuant to s 323 of the CPC was whether the magistrate had erred when he made the ruling to allow the complainant to be called as a witness to tender his police report.

Held, dismissing the MACC's application for revision and stay of execution:

(1) From the record of proceedings it was found that counsel for the deceased's family had intended to introduce the police report and the complainant as a witness to show that the MACC officer who had questioned the deceased was not telling the truth when he said that no violence was used against any suspect by the MACC or its officers and to show that actual violence and other violence had been perpetrated by the MACC officers in the office where the deceased was interrogated before his death. To support his ruling to call the complainant as a witness the magistrate had cited ss 11(b), 14 and 15 of the Evidence Act 1950 ('the Act'). However, based on ss 11(b) and 15 of the Act alone it was apparent that the magistrate did not err in law to allow similar fact evidence to be considered. It was in the interest of justice that the family of the deceased be given the opportunity to bring in the complainant to rebut the evidence given by the MACC witnesses who deny any form of violence being perpetrated by them. Although there was no nexus between the complainant's case and the present case in terms of the date of the interrogation, the person involved and the subject matter of the interrogation, the nexus that existed between these

two cases was the similar fact evidence that the deceased's family was seeking to establish. The magistrate was also correct and fair in limiting the scope of the complainant's evidence, by stating that the police report be tendered through the complainant and allowing the MACC to recall its witness (see paras 56–57& 60).

(2) Upon a perusal of the record of proceedings and after hearing the submissions of the relevant parties it was found that there was nothing incorrect, illegal or improper about the magistrate's ruling. The magistrate had not erred in fact or law or in any way misdirected himself to cause any miscarriage of justice in his ruling. There was therefore no need to expunge the complainant's evidence, the police report and photographs from the records of the inquest. As the whole purpose of the inquiry was to find out the cause of death of the deceased the magistrate should be given the independence to decide who to believe and make his own findings in order to arrive at a verdict (see para 65).

(3) With regard to the oral application for a stay of execution pending an appeal to the Court of Appeal, there were no special circumstances to justify such a stay. Giving notice of an intention to file an appeal to the Court of Appeal did not amount to special circumstances (see para 69).

[Bahasa Malaysia summary

Pada inkues koroner mengenai sebab kematian Teoh Beng Hock ('si mati'), peguam bagi pihak keluarga si mati cuba untuk mengemukakan laporan polis ('laporan polis') yang dibuat oleh Sivanesan ('pengadu'), suspek yang disoal siasat oleh Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'). Dalam laporan polis tersebut, pengadu mendakwa intimidasi, seksaan, keganasan dan penderaan yang dilakukan terhadapnya oleh pegawai-pegawai SPRM semasa menjalankan penyiasatan mereka. Peguam bagi pihak keluarga si mati menuntut untuk mengemukakan laporan polis semasa pemeriksaan balas pegawai daripada SPRM tetapi Pengarah Perundangan dan Pendakwaan ('pengarah') SPRM menghalang pengemukaan laporan polis semasa pemeriksaan balas pegawai SPRM atas dasar bahawa laporan polis tersebut hanya boleh dikemukakan sekiranya pengadu, iaitu orang yang membuat laporan polis, dipanggil sebagai saksi. Selanjutnya SPRM menghujah bahawa mereka tidak menerima salinan laporan polis tersebut. Melalui permohonan ini oleh pengarah SPRM, majistret yang membicarakan inkues mengarahkan agar salinan laporan polis diberikan kepada SPRM. Apabila mahkamah menyambung semula perbicaraan, pengarah memaklumkan mahkamah bahawa laporan polis tersebut tidak relevan kerana tiada perhubungan di antara laporan polis pengadu dan kematian si mati dalam kes ini. Pengarah menegaskan bahawa pengadu telah disoal siasat sebagai suspek dalam kesnya

manakala si mati disoal siasat sebagai saksi dalam kes ini. Oleh itu pengarah tersebut menghujah bahawa kesan prejudis membenarkan keterangan pengadu diterima melebihi nilai probatif keterangan tersebut dan mendesak majistret untuk mengubah keputusannya. Peguam bagi pihak keluarga si mati menghujah atas dasar terdapat keterangan fakta yang sama dalam kandungan laporan polis berkenaan tempat dan saksi yang sama. Dia menghujah bahawa memandangkan tujuan utama inkues ialah untuk mencari punca kematian si mati di bawah s 328 Kanun Prosedur Jenayah ('CPC'), penerimaan keterangan dan laporan polis boleh membantu bagi mencapai tujuan ini. Peguam Kerajaan Negeri Selangor menghujah bahawa tiada prejudis kepada SPRM oleh keputusan majistret dalam membenarkan pengadu untuk memberi keterangan dan laporan polis. Dia juga membawa kepada perhatian majistret mengenai fakta bahawa terdapat keterangan sedia ada dikemukakan sebelum si mati jatuh, seperti dinyatakan oleh ahli patologi yang konsisten dengan kesimpulan bahawa terdapat serangan ke atas si mati. Selepas perbicaraan pihak-pihak, majistret tidak mengubah keputusannya merujuk kepada kebolehterimaan laporan polis dan memanggil pengadu sebagai saksi. Berdasarkan keputusan majistret, pengadu menjadi saksi dan memberikan keterangan di inkues. Pengarah SPRM kemudiannya memfailkan permohonan ini untuk semakan keputusan majistret dan juga memohon agar keterangan pengadu ditolak daripada mahkamah. Satu-satunya isu untuk ditentukan dalam permohonan untuk semakan ini menurut s 323 KPJ ialah sama ada majistret membuat kesilapan apabila dia membuat keputusan untuk membenarkan pengadu dipanggil sebagai saksi untuk mengetengahkan laporan polisnya.

Diputuskan, menolak permohonan MACC untuk semakan dan penggantungan pelaksanaan:

(1) Daripada rekod prosiding-prosiding, didapati peguam bagi pihak keluarga si mati cuba untuk mengemukakan laporan polis dan pengadu sebagai saksi untuk menunjukkan bahawa pegawai SPRM yang menyoal siasat si mati tidak berkata benar apabila dia berkata bahawa tiada keganasan yang digunakan terhadap mana-mana suspek oleh SPRM atau pegawai-pegawainya dan untuk menunjukkan bahawa keganasan sebenar dan keganasan lainnya telah dilakukan oleh pegawai-pegawai SPRM di pejabat di mana si mati disoal siasat sebelum kematiannya. Bagi menyokong keputusan beliau untuk memanggil pengadu sebagai saksi, majistret merujuk ss 11(b), 14 dan 15 Akta Keterangan 1950 ('Akta'). Walau bagaimanapun, berdasarkan ss 11(b) dan 15 Akta adalah jelas bahawa majistret tidak membuat kesilapan dalam undang-undang dalam membenarkan keterangan fakta yang sama untuk dipertimbangkan. Adalah dalam kepentingan undang-undang bahawa keluarga si mati diberi peluang untuk

membawa pengadu bagi mematahkan keterangan yang diberikan oleh saksi SPRM yang menafikan sebarang bentuk keganasan yang dilakukan oleh mereka. Walaupun tidak terdapat sebarang kaitan antara kes pengadu dan kes ini mengenai tarikh soal siasat, individu yang terlibat dan perkara subjek soal siasat, perkaitan yang wujud di antara kedua-dua kes tersebut adalah keterangan fakta yang sama yang ingin dibuktikan oleh keluarga si mati. Majistret juga betul dan adil dalam menghadkan skop keterangan pengadu dengan menyatakan bahawa laporan polis perlu dikemukakan melalui pengadu dan membenarkan SPRM untuk memanggil semula saksinya (lihat perenggan 56–57& 60).

(2) Setelah meneliti rekod prosiding-prosiding selepas mendengar hujahan-hujahan pihak-pihak yang relevan, didapati bahawa tiada apa-apa yang tidak benar, menyalahi undang-undang atau salah mengenai keputusan majistret. Majistret tidak membuat kesilapan dalam fakta atau undang-undang atau dalam apa-apa cara tersalah arah dan menyebabkan salah laksana keadilan dalam keputusannya. Oleh itu keterangan pengadu, laporan polis dan foto-foto daripada rekod inkues tidak perlu ditolak. Memandangkan tujuan siasatan dijalankan adalah untuk mencari punca kematian si mati, maka majistret perlu diberi kebebasan untuk menentukan siapa untuk dipercayai dan membuat dapatannya bagi mencapai keputusan (lihat perenggan 65).

(3) Berhubung dengan permohonan lisan untuk penggantungan pelaksanaan sementara menunggu rayuan ke Mahkamah Rayuan, tidak terdapat keadaan istimewa untuk menjustifikasikan penggantungan tersebut. Memberi notis niat untuk memfailkan rayuan ke Mahkamah Rayuan tidak bermaksud keadaan istimewa (lihat perenggan 69).]

Notes

For a case on coroner's inquiry, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 3125.

For cases on when admissible, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2283–2288.

Cases referred to

Director of Public Prosecutions v Boardman [1975] AC 421, HL (refd)

Harris v Director of Public Prosecutions [1952] 1 All ER 1044, HL (refd)

Loh Kah Kheng, Re (deceased) [1990] 2 MLJ 126, HC (refd)

Makin v Attorney-General for New South Wales [1894] AC 57, PC (refd)

R v Raju & Ors v R [1953] MLJ 21, HC (refd)

Retnarasa a/l Annarasa v PP [2008] 8 MLJ 608; [2008] 4 CLJ 90, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 31, 35, 35(2), 36, 37
Criminal Procedure Code ss 323, 324, 325, 326, 327, 328, Chapter XXXI
Evidence Act 1950 ss 11, 11(b), 14, 15

Abdul Razak Musa (Manoj Kurup and Wong Chiang Kiat with him) (Director of Legal Matters & Prosecution, MACC) for the applicant.
Gobind Singh Deo (Karpal Singh and Sangeet Kaur Deo with him) (Gobind Singh Deo & Co) watching brief for the family of the deceased.
Malik Imtiaz Sarwar (Sreekant Pillai with him) watching brief for the State of Selangor.
M Visanathan (June Lo with him) watching brief for the Bar Council.

Yeoh Wee Siam JC:

THE APPLICATION

[1] This is an application for revision made on behalf of the Malaysian Anti-Corruption Commission ('the MACC') by YBhg Dato' Abdul Razak bin Musa ('Dato' Razak'), the director of legal matters and prosecution, regarding the ruling made on 8 September 2009 by the magistrate sitting in his capacity as the coroner in the Shah Alam Magistrate's Court in Inquest No 88–10 of 2009 pertaining to the cause of death of the deceased, Teoh Beng Hock ('the deceased').

FACTS

[2] Briefly, the background facts are as follows.

[3] On 8 September 2009, in the course of the cross-examination of the 19th witness in the inquest, SI19, ie Mohd Ashraf bin Mohd Yunus ('Ashraf'), learned counsel who was watching brief for the family of the deceased, Mr Gobind Singh Deo ('Mr Gobind'), attempted to introduce a police report made by a complainant, one T Sivanesan ('the complainant') on 11 September 2008 ie Shah Alam police report 11/006917/08 ('the police report').

[4] Dato' Razak, on behalf of the MACC, objected to the introduction of the police report in such manner, stating that there is no procedure in an inquest to allow cross-examination of a witness based on a police report. Moreover, MACC had not been served with a copy of the police report.

[5] After hearing the submissions of all parties, at about 12.20pm, the magistrate ordered Mr Gobind to give a copy of the police report to Dato' Razak for him to look into the matter.

[6] When the magistrate resumed hearing at 12.42pm, Dato' Razak, informed the court that the police report is not relevant and that Ashraf's name is not contained in the police report. He submitted that if the police report is to be produced, then the maker or the complainant has to be called as a witness. At that stage, the magistrate made a ruling that the police report would be tendered through the complainant, and not through the cross-examination of SI19 by Mr Gobind.

[7] The learned deputy public prosecutor ('the DPP') also agreed that the complainant should be called as a witness.

[8] Dato' Razak then stated that he could not see the relevancy of calling the complainant.

[9] The DPP, when requested by the magistrate to state his stand on relevancy, stated that both parties had agreed to call the complainant, and MACC has the right to challenge his evidence.

[10] The magistrate then made the following ruling (see p 14 of the notes of proceedings on 8 September 2009):

> On the issue of relevancy the guidelines in the court of inquest would also be the Evidence Act, ss 11(b), 14 and 15 are on similar fact evidence that seek to be introduced in this proceeding on the basis that it happened at the same location in SPRM Selangor and might involve the same persons who are witnesses in this case and it might relate to same form of pressure being applied or interrogation, those facts might be similar or relevant. The test, principle in common law case of*Director of Public Prosecutions v Boardman* [1975] AC 421 and *Makin v Attorney-General for New South Wales* [1894] AC 57 to show that if the facts are strikingly similar to the facts in issue then the court is allowed to admit those evidence. Pihak-pihak telah berhujah, based on police report, facts are relevant to this inquest, but the scope to admit those report is just for the purpose of determining whether there is interrogation, use of force and whether SI19 is involved in it. To tender the report through the complainant, SPRM can recall witness.

[11] The records show that on 9 September 2009, Dato' Razak made an oral application to the magistrate to review his above ruling and not to allow the complainant to be called as a witness. He submitted that there would be no probative value in calling the complainant and the prejudicial effect of calling him would be great considering that the investigations on the complainant as a suspect by the MACC on another matter have not been completed yet. Moreover, he found the police report rather suspicious and he needed other documents eg the complainant's medical report and results of police investigation on the matter. After hearing all parties, the magistrate

decided not to review his ruling made on 8 September 2009 but to proceed with the inquest in an open manner and with transparence, taking into account the concerns of all parties.

[12] Just before the complainant started giving his evidence in the inquest on the morning of 9 September 2009, Dato' Razak wrote the letter of application to the High Court, Shah Alam for revision of the magistrate's ruling. However, he only filed it with the High Court Shah Alam in the Petaling Jaya registry in the afternoon of 9 September 2009.

[13] By the time, the High Court Shah Alam sat in Petaling Jaya to hear the application, the complainant, SI20, had already given his evidence after being questioned by Mr Gobind.

[14] The proceedings in the inquest were automatically stayed under s 35(2) of the Courts of Judicature Act 1964 when the High Court called for the records of the magistrate's court, regarding the inquest on the afternoon of 9 September 2009 after receiving the application for revision.

[15] The application was heard by me in open court on 10 September 2009.

Submissions of the MACC in support of the application

[16] The main points of the applicant's submissions as stated in the letter of application and the written and oral submissions are as follows.

[17] The evidence given by the complainant, SI20, is totally prejudicial to the MACC and has no nexus to the inquiry at hand. It tantamounts to 'collateral proceedings' with no other than an oblique purpose to smear, taint and tarnish the image of the MACC. SI20's evidence and the police report (I-67) are pure speculation and conjecture on a so-called pattern of behavior attributed to an entire organisation. It does not show that SI19 (Ashraf) assaulted the deceased.

[18] The coroner erred in law when he held that the testimony of SI20 is admissible under ss 11(b), 14 and 15 of the Evidence Act 1950 on the basis that '... berlaku tempat yang sama, melibatkan pihak yang sama dan mungkin guna cara yang sama'.

[19] Evidence of similar facts should be excluded unless such evidence has a really material bearing on the issues decided (see *R v Raju & Ors v R* [1953] MLJ 21 and *Harris v Director of Public Prosecutions* [1952] 1 All ER 1044).

A The coroner's purpose in allowing SI20's evidence based on 'mungkin guna cara yang sama' was not clear at all. It was speculative and undirected. The end result would be prejudicial evidence that would besmirch the entire organisation of the MACC.

B

[20] The magistrate erred when he mentioned 'sama ada kekerasan digunakan'. The uncontroverted testimony of the pathologist, SI15, was that there were no pre-fall bodily injuries on the deceased. There was nothing to suggest that SI19 used force on the deceased. Whether SI20 was assaulted by C SI19 or others would not assist the coroner in determining what the cause of death of the deceased was.

[21] The police report and SI20's testimony relate to an entirely different case where he was the suspect and investigations have not been completed. It D relates to an entirely different period. The police report was lodged on 11 September 2008 ie ten months before the deceased's death. There is no nexus between that incident that happened to SI20, if it happened at all, and the deceased's death.

E

[22] The magistrate had earlier on expunged other evidence in the same inquest on grounds that it impinged on the credibility of others. Likewise, the High Court, in exercising its revisionary powers, can expunge the testimony of SI20 and the two exhibits ie the police report ('I-67') and the photographs F showing the injuries suffered by SI20 ('I-68').

Mr Gobind's submissions on behalf of the family of the deceased

[23] Under s 328 of the Criminal Procedure Code ('the CPC'), the G meaning of 'cause of death' also includes all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death. The magistrate's duty is to find out the cause of death. In *Re Loh Kah Kheng (deceased)* [1990] 2 MLJ 126 at p 127 (pp 27–28 of his bundle of authorities), even hearsay evidence can be admitted in an inquest.

H

[24] SP19, Ashraf, was an officer at the MACC who interrogated the deceased. There is reason to believe that he assaulted the deceased. In cross-examination, SP19 denied torture during MACC interrogation. He I said he himself was not involved.

[25] Mr Gobind's instructions are that SP19 had been involved in an assault at the same place. He just wanted to put forward this evidence and let the magistrate decide whether to believe SP19 or not.

[26] Mr Gobind was not maligning the MACC. The MACC can deny the allegations and cross-examine SI20. How can the magistrate be said to be in error if he feels that this witness is necessary to help him come to a finding?

[27] Looking at the sequence of events, the police report was first put in during the cross-examination of SP19; Dato' Razak then objected. He said the proper way was to call this witness. When Mr Gobind brought in the witness, Dato' Razak turned around and said that it is wrong. The magistrate ruled the police report is relevant. This is a complete misconduct by Dato' Razak, unconscionable and unacceptable at the Bar.

[28] Mr Tan Hock Chuan, acting on behalf of the prosecution, had no objections to the police report being adduced but said that the court is to limit the evidence.

[29] Regarding similar fact evidence, the magistrate read the police report and said that the contents relate to the same place and the same witness. The MACC will deny that there was violence on the 14th floor of the MACC building and say that the deceased committed suicide. The magistrate referred to s 11 of the Evidence Act 1950 on similarity, same place and same witness.

[30] At the end of the inquest, Mr Gobind will submit that the MACC witnesses cannot be believed. If the MACC is allowed to bring in its own witnesses, why can't the family of the deceased do so?

[31] The High Court ought not to interfere, but should let the magistrate carry on with the inquest. The magistrate can decide at the end of the day on who to believe.

Submissions by Encik Malik Imtiaz Sarwar, counsel watching brief for the Selangor DE State Government

[32] Mr Manoj Kurup said that there were no pre-fall injuries. That is not true. The pathologist testified that there were such injuries. The MACC is mischievous and supplanting the coroner's court.

[33] The matter falls squarely under s 11(b) of the Evidence Act 1950. There is a nexus ie someone falling out of the same window nine months later. This is similar fact evidence.

[34] There is no prejudice caused to the MACC by the coroner's ruling in allowing SI20 to testify. Mr Gobind kept within the perimeters set by the

A coroner's court. There is no question of prejudice or embarrassment in inquisitorial proceedings and not to allow it will be prejudicial to the right to know the truth (see *Retnarasa a/l Annarasa v Public Prosecutor* [2008] 8 MLJ 608 at p 609; [2008] 4 CLJ 90 at p 91).

B HIGH COURT'S DECISION

[35] The High Court's revisionary powers for criminal proceedings are provided in ss 31, 35, 36 and 37 of the Courts of Judicature Act 1964, and C Chapter XXXI, ss 323 to 327 of the CPC.

[36] Under s 323 of the CPC, a judge of the High Court 'may call for and examine the record of any proceeding before any subordinate criminal court for the purpose of satisfying himself as to the correctness, legality or propriety D of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate court'.

[37] Under s 326 of the CPC, 'No party has any right to be heard, either E personally or by advocate, before a Judge when exercising his powers of revision'.

[38] Notwithstanding s 326 of the CPC, in the interest of justice, I fixed F the revision case for hearing in order to hear the submissions of the relevant parties.

[39] After perusing the record of proceedings of the magistrate's court and after considering submissions of the applicant, Mr Gobind and Encik Malik G Imtiaz Sarwar, I am of the following opinion.

[40] The sole purpose of the inquest is for the coroner to find out the cause of death of the deceased under s 328 of the CPC.

H

[41] When the magistrate holds the inquiry, he shall under s 337 of the CPC, 'inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death'.

I

[42] Practice Note No 1 of 2007 on guidelines on inquest formulated by the Chief Judge of Malaya and which came into effect on 1 February 2007 has aptly explained in para 1 of p 1 that an inquest is not like a trial. There are no parties to prosecute and to defend. It is only an inquiry by a magistrate

as to the cause of death. The public prosecutor is there not to prosecute anyone but only to assist the court with the examination of witnesses for the purpose of giving evidence.

[43] In para E of p 7 of the same Practice Note, it states, inter alia, that 'the procedure and rules of evidence are not to be strictly applied. The procedure and rules of evidence which are suitable for the accusatorial process are unsuitable for inquisitorial process'.

[44] The Practice Note is not law but it serves well as an administrative guideline to all magistrates who sit as coroners in any inquest.

[45] I have perused the contents of the police report made by SI20. It is true, as submitted by the MACC, that SI20's report is about another incident that allegedly happened ten months before the death of the deceased in this case. SI20 had alleged intimidation, torture, violence and abuse perpetrated against him by the MACC officers in the course of their investigations against him as a suspect for some possible offence. I also note that nowhere in the police report was Ashraf's name mentioned. That is why Dato' Razak persistently maintained his stand that the police report is not relevant because there is no nexus between SI20's police report and the death of the deceased in this case. He said that SI20 was interrogated as a suspect in his case whereas the deceased was interrogated as a witness in this case. He also contended that the prejudicial effect of allowing the evidence of SI20 to be admitted, on the MACC, far outweighs the probative value of such evidence being admitted.

[46] From the record of proceedings on 8 September 2009, I find that Mr Gobind had two main reasons to introduce the police report and also SI20 as a witness, namely:

(a) to show that SI19 was not telling the truth when he said that no violence was used against any suspect by the MACC or its officers; and

(b) there was actually violence and other abuse that were perpetrated by the MACC officers on the same 14th floor of the MACC office at Plaza Masalam, where the deceased was interrogated immediately before his death.

[47] Mr Gobind went on the basis that there was similar fact evidence and contended that 'if we don't inquire into what had happened then we would never find out who were involved if there were criminal activity involved ... It's not a normal occurrence that people fall from the 14th floor while they were being investigated by the MACC; for that reason alone we seek to be given a latitude'.

A **[48]** The DPP then referred to para 2 of Practice Note No 1 of 2007 where it is provided that 'the proceedings and evidence at an inquest shall be directed solely at ascertaining', inter alia, '(b) how, when and where the deceased came by his death'. He was of the view that the 'family of the deceased has the right to forward question which may assist the court in
B determining how, when and where the deceased came by his death'. He agreed that some level of latitude be given to the family and MACC when asking questions. He stated that if Dato' Razak was given a copy of the police report then the magistrate 'can allow questions which are relevant ..., challenging the credibility of witness is also pertinent'.

C

[49] Encik Malik Imtiaz Sarwar also brought to the magistrate's attention that there was already evidence adduced of pre-fall injuries on the deceased, as stated by the pathologist, which led to the conclusion that may be consistent with an assault on the deceased.

D

[50] The magistrate did allow Dato' Razak to state his views and objections after the latter was supplied with a copy of the police report. He again did hear the submissions of all parties before making his ruling (see pp 9–13 of the notes of proceedings on 8 September 2009). On record, Dato' Razak had
E stated that if the police report was to be tendered, then the complainant has to be called as a witness (see p 12 of the notes of proceedings on 8 September 2009).

F **[51]** From the notes of proceedings on 8 September 2009, it is clear that the magistrate had considered all the views of all the parties, and with their agreement, including Dato' Razak's, had decided to make the ruling to allow SI20 to be called as witness to tender his police report.

G **[52]** Regarding the magistrates' ruling to call SI20 as a witness (see p 14 of the notes of proceedings on 8 September 2009), the magistrate cited ss 11(b), 14 and 15 of the Evidence Act 1950 on similar fact evidence. His basis is that 'it happened at the same location in SPRM Selangor and might involve the same persons who are witnesses in this case and it might relate to same form
H of pressure being applied or interrogation, those facts might be similar or relevant'. He also followed the principle in *Director of Public Prosecutions v Boardman* [1975] AC 421 and *Makin v Attorney-General for New South Wales* [1894] AC 57, to show that if the facts are strikingly similar to the facts in issue then the court is allowed to admit those evidence.

I

[53] The magistrate did not go into detail regarding ss 11(b), 14 and 15 of the Evidence Act 1950. I note that s 14 is regarding the relevancy of facts showing the existence of the state of mind or of body or bodily feeling. Section 14 is relevant, but I think ss 11(b) and 15 are more relevant here.

[54] Section 11(b) of the Evidence Act 1950 provides:

> 11 Facts not or otherwise relevant are relevant —
>
> (a) ...
>
> (b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

[55] Section 15 of the same Act provides:

> 15 Facts bearing on questions whether act was accidental or intentional
>
> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

[56] Based on ss 11(b) and 15 of the Evidence Act 1950 alone, I am of the opinion that the magistrate did not erred in law to allow similar fact evidence to be considered ie to allow SI20 to be called as a witness to give evidence of torture and violence being perpetrated against him at the same place and by the MACC officers during an investigation. Such similar fact evidence does have material bearing on the issues to be decided by the magistrate in the inquest (see *R v Raju & Ors v R* and *Harris v Director of Public Prosecutions* as cited by the MACC). The magistrate's ruling will allow the family of the deceased the leeway to rebut the evidence of SI19 and the MACC that they do not threaten or torture anyone under investigation or interrogation by them. There is evidence given by the pathologist of pre-fall injuries. The family of the deceased do not believe that the deceased committed suicide; they believe that there must have been assault that led to the deceased's fall from the 14 floor of Plaza Masalam. It is in the interest of justice that the family of the deceased be given the opportunity to bring in SI20 to rebut the evidence given by the MACC witnesses who deny any form of violence being perpetrated by them. As Mr Gobind had submitted before me, if the MACC can be allowed to bring in their own witnesses to testify that there was no violence perpetrated by them, then why can't the family of the deceased be allowed to bring in their witness to prove otherwise?

[57] As submitted by the MACC, there is no nexus between SI20's case and this case in terms of date of interrogation, the person involved and the subject matter of the investigation. SI20 was a suspect being investigated for two other matters; the deceased was interrogated as a witness for another case not related to SI20's matters. However, the nexus that can exist between these two cases is the similar fact evidence that the family of the deceased is seeking to

A establish ie just as SI20 was being tortured and abused during investigation by the MACC officers at the 14th floor of the MACC office, so did such torture and abuse happen to the deceased during the investigation and his interrogation by the MACC officers at the same place.

B **[58]** I bear in mind that the whole purpose of the inquiry is to find out the cause of death. As correctly submitted by Mr Gobind, under s 328 of the CPC, 'cause of death' includes 'also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his sudden death and as to whether his death resulted in any way from, or was accelerated C by, any unlawful act or omission on the part of any other person'.

[59] The magistrate did not make an open-ended ruling to allow SI20 to give his evidence on the police report. Instead, he rightly limited the scope of D SI20's evidence to determine the following three matters:

(a) whether there is interrogation;

(b) whether there is use of force; and

E (c) whether SI19 is involved in it.

[60] The magistrate ended his ruling by stating that the police report was to be tendered through the complainant ('SI20') (as previously suggested by Dato' Razak) and the MACC be allowed to recall its witness, which I think F is correct and very fair.

[61] The MACC applied for revision of the magistrate's ruling only after SI20 was called as a witness and had already given his evidence after being G questioned by Mr Gobind at the inquest.

[62] I found from the records that Dato' Razak had been rather inconsistent in his stand. First, he objected to the tendering of the police report by Mr Gobind during the cross-examination of SI19, stating that it H was not the right thing to do since there is no provision for such kind of cross-examination during an inquest. He submitted to the magistrate that such police report can only be tendered if the complainant, ie the maker of the police report, was called as a witness. On his application, the magistrate directed Mr Gobind to supply Dato' Razak with a copy of the police report. I The understanding of all parties, including Dato' Razak, on 8 September 2009 is that the complainant would be called as a witness to tender his police report. Later, Dato' Razak changed his mind and wanted the magistrate to change his ruling as well. The magistrate, after hearing all parties again, did not change his ruling made on 8 September 2009.

[63] Based on the magistrate's ruling, SI20 took his stand as a witness on 9 September 2009 and gave evidence at the inquest. Immediately after that, Dato' Razak filed the application for revision, and also applied for SI20's evidence to be expunged from the court.

[64] Upon a perusal of the record of proceedings, and after hearing the submissions of all relevant parties, I find that there is nothing that is incorrect, illegal or improper about the ruling made by the magistrate to allow SI20 to be called as a witness to tender the police report according to the scope or perimeters set by the magistrate. There is therefore no necessity to expunge SI20's evidence, the police report and photographs from the records of the inquest.

[65] I am satisfied that the magistrate did not err in fact or law, or had in any way misdirected himself to cause any miscarriage of justice in his ruling. I believe such ruling should be upheld since the magistrate's purpose is to find out the cause of death of the deceased. The MACC is to be given every opportunity to cross-examine SI20 and challenge or rebut his testimony. If there is nothing to hide, the MACC should not be unduly worried. The whole purpose of the inquiry is to seek the truth. At the end of the day, it is the magistrate who has to decide who to believe, and make his own findings in order to arrive at a verdict. I believe that the magistrate should be given the independence and leeway to conduct the inquiry according to law.

[66] Based on the above, there is no justification for me to revise the decision of the magistrate. Accordingly, I dismissed the application of the MACC.

[67] Mr Manoj Kurup, on behalf of the MACC applied for stay of execution pending an appeal to the Court of Appeal. Mr Gobind objected to such application and also questioned whether there is any legal provision for stay from a decision of the High Court on a revision matter. Dato' Razak and his team were not able to furnish me with any provision on stay except s 35(2) of the Courts of Judicature 1964 which I think does not apply here. Section 35(2) only applies to a stay of proceedings in the subordinate court when the High Court calls for its record of proceedings for the purpose of revision and supervision.

[68] Be that as it may, I am of the opinion that this is a public interest case and it should be expedited. As it is, already enough time has been expended through this whole revisionary exercise. Mr Gobind also informed me that on next Monday, ie 14 September 2009, an expert witness would be flying in from Bangkok to give evidence at the inquest and all parties have already been notified.

A **[69]** There were no special circumstances shown to me by the MACC to justify a stay of my order. In my opinion, giving notice of an intention to file an appeal to the Court of Appeal does not amount to special circumstances.

B **[70]** Accordingly, I did not grant the MACC's oral application for stay of execution. I directed all parties to proceed forthwith with the inquest.

MACC's application for revision and stay of execution dismissed.

C Reported by Kohila Nesan

D

E

F

G

H

I